TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 134.

J. B. SHEPARD, PLAINTIFF IN ERROR,

vs.

FRANK ADAMS, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF DENVER.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED FEBRUARY 20, 1896.

(16,198.)

(16,198.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 134.

J. B. SHEPARD, PLAINTIFF IN ERROR,

vs.

FRANK ADAMS, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF DENVER.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 16, 1897.

1 Pleas in the District Court of the United States for the District of Colorado.

DISTRICT OF COLORADO:

Be it remembered that heretofore and on, to wit, the 24th day of August, A. D. 1895, came Frank Adams, receiver of the Commercial National bank, by Messrs. Thomas, Hartzell, Bryant & Lee, his attorneys, and filed in said court his complaint and sued out of and under the seal of said court a writ of summons against J. B. Shepard.

And the said complaint is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the District Court of the United States within and for said District.

FRANK ADAMS, Receiver of The Commercial National Bank of Denver, Plaintiff,
vs.
J. B. SHEPARD, Defendant.

Comes now the above-named plaintiff, by Thomas, Hartzell, Bryant & Lee, his attorneys, and, complaining of the above-named defendant, alleges and says:

1st. That the Commercial National Bank of Denver is a corporation duly incorporated, organized, and existing under and by virtue of the act of Congress concerning national banks, and was a
2 duly organized and existing corporation on the 14th day of July, A. D. 1893, and from that time down to the present; that heretofore and on or about the 24th day of October, A. D. 1893, the said bank having refused to pay its circulating notes and suspended payment to its depositors and being in default, and the Comptroller of the Currency of the United States, being satisfied as to the fact of such refusals, suspension, and default, did, pursuant to the statute in such case made and provided, on the said 24th day of October, 1893, appoint the plaintiff in this suit the receiver of said bank, and this plaintiff thereupon entered upon his duties as such receiver and took possession of the records, books, and assets of said bank, so far as the same could be found, and ever since has continued to be and now is the receiver of said bank, with all the powers and duties incident to the office of such receiver and prescribed by the acts of Congress in such case made and provided, and that said bank, at the time of its failure and suspension, and at the time of the appointment of this plaintiff as receiver thereof, was utterly and wholly insolvent, and is now and at all times since then has been utterly and wholly insolvent.

2nd. That on or about the 7th day of June, 1893, the defendant above named, for a valuable consideration, made, executed,
3 and delivered to the said The Commercial National Bank of Denver his certain promissory note, in and by which he

agreed thirty days after the date thereof to pay to the said bank the sum of $20,000.00, together with interest thereon at the rate of twelve per cent. per annum from date until paid; which said note was in words and figures as follows, to wit:

$20,000.00. DENVER, COLO., *June 7th*, 1893.

Thirty days after date I promise to pay to the order of the Commercial National Bank of Denver twenty thousand dollars, at the Commercial National Bank of Denver, with interest at twelve per cent. per annum from maturity until paid. Value received.

(Signed) J. B. SHEPHARD.

When due, July 7–10.
Number 6615.

And that afterwards and on or about the 12th day of July, 1893, the said defendant did pay on said note the sum of two thousand and thirty-five dollars and seventy cents, and upon the dates hereinafter named the said defendant also did pay on account of said note the sums hereinafter mentioned, to wit, July 14th, 1893, $1,000; October 31st, 1893, $32.00; April 11th, 1894, $6.00; September 25th, 1894, $19.00; December 27th, 1894, $12.00; April 16th, 1895, $5.00; all of which said payments were duly endorsed on the back of said note, the same being all of the payments which have ever
4 been made on account thereof.

That after the appointment of this plaintiff as receiver of said bank he found said note among the assets of said bank and demanded payment thereof from said defendant, but the said defendant wholly failed to pay the same and ever since then has wholly failed and neglected to pay the same or any part thereof, except as hereinbefore stated, and there is now due and owing from the said defendant to this plaintiff in principal and interest on said note the sum of $21,700.14.

Wherefore the said plaintiff prays judgment against the said defendant for the sum of $21,700.14, together with interest and costs of suit.

THOMAS, HARTZELL, BRYANT & LEE,
Attorneys for Plaintiff.

(Indorsed:) 1180. U. S. district court. Frank Adams, receiver of The Commercial National Bank, *vs.* J. B. Shepard. Complaint. Filed Aug. 24, 1895. Francis W. Tupper, clerk. Thomas, Hartzell, Bryant & Lee, attorneys for plaintiff.

And the said summons and proof of service is in words and figures as follows, to wit:

5 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the District Court of the United States for the District of Colorado.

FRANK ADAMS, Receiver of The Commercial National Bank of Denver, Plaintiff, *versus* J. B. SHEPARD, Defendant. } Complaint. Filed in the Clerk's Office this 24 Day of Aug., A. D. 18—.

The President of the United States of America to J. B. Shepard, Greeting:

You are hereby notified that an action has been brought in said court by Frank Adams, receiver, etc., plaintiff, against you as defendant to recover the sum of $21,700.14 due from defendant to plaintiff on a certain promissory note made and delivered by defendant to the Commercial National Bank of Denver for the sum of $20,000.00, dated at Denver, Colorado, June 7th, 1893, together with interest on said sum from August 24th, 1895, as more fully set forth and described in the complaint filed herein and to which reference is here made, and for costs of suit.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of
6 Arapahoe; otherwise within forty days from the day of service, and if you fail so to do the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, for said sum of $21,700.14, interest as aforesaid, and costs.

Witness the Honorable Moses Hallett, judge of the district court of the United States for the said district, and the seal [SEAL.] thereof, at the city of Denver, in said district, this 24th day of August, A. D. 1895, and of the Independence of the United States the 120th year.

FRANCIS W. TUPPER, *Clerk,*
By CHARLES W. BISHOP,
Deputy Clerk.

Proof of Service.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

DENVER, *Aug. 27th, A. D.* 1895.

I hereby certify that I received the within writ on the 24th day of August, A. D. 1895, and that I have personally served the same upon the said defendant, J. B. Shepard, by delivering to him personally a true copy of the within writ at the time and place as follows: At Denver, county of Arapahoe, on the 27th day of August, A. D. 1895.

7 This writ therefore returned, served as the law directs, this 27th day of August, A. D. 1895.

By HENRY S. DAVIS,
Deputy Marshal.

(Indorsed:) No. 1180. District court of the United States for the district of Colorado. Frank Adams, receiver, etc., plaintiff, *versus* J. B. Shepard, defendant. Summons. Filed Aug. 28th, 1895. F. W. Tupper, clerk. Thomas, Hartzell, Bryant & Lee, for pl'ff.

Forty-eighth day, November term.

SATURDAY, *January 4th, A. D.* 1896.

Present: Honorable Moses Hallett, district judge, and other officers as noted on the 5th day of November last past.

FRANK ADAMS, Receiver of the Commercial National Bank of Denver, *vs.* J. B. SHEPARD.	1180.	Action on Promissory Note.

At this day comes the plaintiff, by W. H. Bryant, Esq., his attorney, and the defendant, by A. L. Doud, Esq., his attorney, who appears specially for the purpose of this motion only, also comes.

And thereupon, the motion of the defendant to quash the summons herein coming on now to be heard, is submitted to the court, and the court, being sufficiently advised in the premises, it is ordered, for good and sufficient reasons to the court appearing, that said motion be, and is hereby, denied.

Whereupon the plaintiff moves the court for entry of de-
8 fault and for judgment against the defendant.

And it now appearing to the court that the said defendant hath been duly served with summons herein and the time allowed by law and the rule and practice of the court to answer having since exp ed and no demurrer or answer having since been filed herein and he defendant still failing and refusing to answer or plead, it is orde ed that the default of the defendant be, and is hereby, entered of record.

And thereupon the court doth assess the plaintiff's damages by reason of the premises in his complaint mentioned at twenty-two thousand three hundred and fifty-one dollars ($22,351.00).

Wherefore it is considered by the court that judgment be entered herein in favor of the plaintiff and against the defendant for the said sum of twenty-two thousand three hundred and fifty-one dollars ($22,351.00) damages and the plaintiff's costs, to be taxed.

And day until thirty (30) days from this day is allowed the defendant within which time to file a bill of the exceptions reserved by him upon the order and ruling of the court herein and supersedeas bond upon writ of error will be in the sum of twenty-five thousand dollars ($25,000.00).

9 SATURDAY, *January 4th, A. D.* 1896.

FRANK ADAMS, Receiver of the Commercial National Bank of Denver, *vs.* J. B. SHEPARD.	1180. Action on a Promissory Note.

On this 4th day of January, A. D. 1896, the same being one of the regular juridical days of the November term, A. D. 1895, of said court—

Present: Honorable Moses Hallett, district judge.

It is considered by the court that the plaintiff do have and recover of and from the defendant twenty-two thousand three hundred and fifty-one dollars ($22,351.00), his damages by occasion of the premises in his complaint mentioned in form aforesaid assessed, and his costs by him in this behalf laid out and expended, to be taxed, and have execution therefor.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the District Court of the United States within and for said District.

FRANK ADAMS, Receiver of the Commercial National Bank of Denver, Plaintiff,
vs.
J. B. SHEPARD, Defendant.

Bill of Exceptions.

10 Be it remembered that the summons in the above-entitled cause was issued and made returnable under and in pursuance of the general rule of this court, duly adopted on the 10th day of October, 1877; which said general rule is in the words and figures following, to wit:

RULE III.

Actions at Law.

"Actions at law shall be commenced by filing a complaint with the clerk, upon which a summons shall be issued, directed to the defendant, requiring him to appear and demur or answer to the complaint within ten days from the lay of service, if such service shall be made within the county from which the summons was issued, and within forty days from the day of service if such service shall be made elsewhere in the district. Except as provided in these rules and in the laws of the United States, the summons and the pleadings and proceedings in the action shall be as prescribed in the laws of the State."

Be it further remembered that on March 17th, A. D. 1877, the General Assembly of the State of Colorado duly enacted an act,

entitled "An act providing a system of procedure in civil actions in the courts of justice of the State of Colorado," and that said act was duly approved and took effect upon said last-named date; that said act was in full force and effect at the time of the adoption of said rule of court hereinabove set out, and that said act contains *inter alia* the following provisions:

Chapter III, section 29:

"Civil actions in the district courts and county courts shall be commenced by the filing of a complaint with the clerk of
11 the court in which the action is brought and the issuing of a summons therein: provided, that after the filing of the complaint a defendant in the action may enter his appearance therein, personally or by attorney, which appearance shall be equivalent to personal service of the summons upon him."

SECTION 32. "The time in which the summons shall require the defendant to answer the complaint shall be as follows: 1st, If the defendant is served within the county in which the action is brought, ten days.

2nd. If the defendant is served out of the county but in the district in which the action is brought, twenty days. 3rd, For all other cases, forty days."

And be it further remembered that the General Assembly of the State of Colorado did, by an act which was duly approved on April 7th, 1887, and which took effect on the 1st day of August, 1887, repeal said sections 29 and 32 hereinabove set forth and all acts or parts of acts amendatory of said sections 29 and 32, and did enact the following section, which was duly approved and took effect on the 5th day of August, A. D. 1887, and has been in force ever since said last-named date and until the present time, to wit:

Chapter III, Section 32. "Civil actions shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, or by the service of a summons.

The complaint must be filed within ten days after the sum-
12 mons is issued, or the action may be dismissed without notice, and in such case the court may, in its discretion, if it shall be of the opinion that the action was vexatiously commenced, tax a reasonable attorney's fee as costs in favor of defendant, to be recovered of plaintiff or his attorney."

And, further, that the General Assembly of the State of Colorado did, by an act duly approved on April the 19th, 1889, which took effect on July 19th, 1889, and which has been in force ever since said last-named date and until the present time, pass an act which included, *inter alia*, the following section:

SECTION 1. "Section thirty-four of an act entitled 'An act to provide a code of procedure in civil actions for courts of record in the State of Colorado, and to repeal all acts inconsistent therewith,' approved April 7, 1887, is hereby amended to read as follows: Sec. 34. The summons shall state the parties to the action, the State, county and court in which it is brought, and require the defendant to appear and answer the complaint within twenty days after the service of the summons, if served in the county in which the action

is brought; or if served out of such county or by publication, within thirty days after the service of the summons, exclusive of the day of service, or that judgment by default will be taken against him according to the prayer of the complaint, and shall briefly state the sum of money or other relief demanded in the action; but the summons shall not be considered void or erroneous on account of an insufficient statement of the relief demanded, unless the same is manifestly misleading. If a copy of the complaint be not served with the summons, or if the service be made out of the State, ten days additional to the time specified in the summons shall be allowed for appearance and answer, but the form of the summons shall be the same in all cases."

13 Be it further remembered that on January 4th, 1896, the same being one of the days of the 1895, November, term of said court, said cause having come on to be heard upon the motion of the defendant to quash the summons issued herein, which said motion is in the words and figures following, to wit:

"UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the District Court of the United States within and for said District.

FRANK ADAMS, Receiver of the Commercial National Bank of Denver, Plaintiff,
vs.
J. B. SHEPARD, Defendant. } Motion.

Comes now the defendant, appearing specially, by Doud & Fowler, his attorneys, and moves the court to quash the summons heretofore issued herein for the following reasons:

First. Said summons is not such a summons as provided for by the statutes of Colorado. The said summons is made returnable and requires the defendant to appear and answer in this action in this court within ten days from the day of the service of said summons instead of thirty days, as provided by the statutes of Colorado.

Second. The copy of said summons served upon said defendant is not certified to as a true copy by the clerk of this honorable court.

(Signed) DOUD & FOWLER,
Att'ys for Def't."

Upon hearing of which said motion the said defendant appeared specially for the purpose of said motion, and for no other purpose, by Doud & Fowler, his attorneys, and the plaintiff by Thomas, Byrant & Lee, his attorneys, and the court, having heard
14 arguments of counsel and being fully advised, did, without delivering an opinion, overrule said motion.

To which said ruling the defendant, by his counsel, then and there duly excepted.

And thereupon elected to stand by said motion to quash said summons.

Whereupon the court rendered judgment against the defendant and in favor of the plaintiff, according to the prayer of the plaintiff's complaint.

To which said judgment the defendant, by his counsel, then and there duly excepted.

But inasmuch as the matters aforesaid do not appear of record counsel for defendant presents this bill of exceptions and prays that the same may be signed and sealed by the court and made a part of the record.

And it is done accordingly this 28th day of January, A. D. 1896.

MOSES HALLETT, *Judge.* [SEAL.]

O K.

THOMAS, BRYANT & LEE.

(Indorsed:) No. 1180. District court of the United States for the district of Colorado. Frank Adams, receiver of the Commercial National bank, *vs.* J. B. Shepard. Filed Jan. 28, 1896. Francis W. Tupper, clerk. Bill of exceptions. Doud & Fowler, att'ys for def't.

15 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the District Court of the United States within and for said District.

FRANK ADAMS, Receiver of the Commercial National Bank, Plaintiff,
vs.
J. B. SHEPARD, Defendant. } Petition.

To the Honorable Moses Hallett, judge of the district court of the United States within and for the district of Colorado:

Comes now the defendant in the above-entitled cause and complains that there is manifest error in the record and proceedings in said cause, to the damage of the defendant, in the overruling of said defendant's motion to quash the summons herein, and also in rendering judgment against the defendant.

Wherefore defendant prays that this court will grant to him a bill of exceptions and allow him the writ of error to the honorable Supreme Court of the United States.

DOUD & FOWLER,
Attorneys for Defendant.

(Indorsed:) No. 1180. In the district court of the United States in and for the district of Colorado. Frank Adams, receiver of the Commercial National bank, *vs.* J. B. Shepard. Petition for writ of error. Filed Jan. 28, 1896. Francis W. Tupper, clerk. Doud & Fowler, att'ys for defendant.

16 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the District Court of the United States within and for said District.

FRANK ADAMS, Receiver of the Commercial National Bank of Denver, Plaintiff,
vs.
J. B. SHEPARD, Defendant.

Assignment of Errors.

Now comes said defendant, by Doud & Fowler, his attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this:

First. That the court erred in overruling the defendant's motion to quash the summons issued herein.

Second. That the court erred in rendering judgment against the defendant, according to the prayer of the plaintiff's complaint.

Wherefore the defendant prays that the judgment aforesaid for and on account of the errors aforesaid may be reversed, and that the defendant may be restored to all rights and privileges which he has lost by reason of the aforesaid judgment and proceedings.

DOUD & FOWLER,
Attorneys for Defendant.

17 (Indorsed:) No. 1180. District court of the United States for the district of Colorado. Frank Adams, receiver of the Commercial Nat'l bank, *vs.* J. B. Shepard. Assignment of errors. Filed Jan. 28, 1896. Francis W. Tupper, clerk. Doud & Fowler, att'ys for defendant.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that we, James B. Shepard and R. L. Wilson and W. P. Baker, are held and firmly bound unto Frank Adams, receiver of the Commercial National Bank of Denver, in the full and just sum of five hundred (500) dollars, to be paid to the said Frank Adams, receiver of the Commercial National Bank of Denver, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at the November term, A. D. 1895, of the district court of the United States for the district of Colorado, in a suit pending in said court between said Frank Adams, receiver of the Commercial National Bank of Denver, plaintiff, and said James B.

Shepard, defendant, judgment was rendered against the said
18 James B. Shepard, and the said James B. Shepard having obtained a writ of error to the Supreme Court of the United States of America and a citation directed to the said Frank Adams, receiver of the Commercial National bank, citing and admonishing him to be and appear in the Supreme Court of the United States of America sixty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said James B. Shepard shall prosecute said writ of error to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

JAMES B. SHEPARD. [SEAL.]
R. L. WILSON. [SEAL.]
W. P. BAKER. [SEAL.]

Approved Jan'y 28th, 1896.
MOSES HALLETT, *Judge.*

Justification.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

R. L. Wilson and W. P. Baker, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in real estate, mining stocks, & other property the sum below set opposite his name, that is to say:

19 As to R. L. Wilson, $500 in unincumbered real estate.

As to W. P. Baker, $500 in mining stocks and other property over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

R. L. WILSON.
W. P. BAKER.

Subscribed and sworn to before me, at Denver, this 27th day of January, A. D. 1896.

[SEAL.] FRANCIS W. TUPPER, *Clerk,*
By CHARLES W. BISHOP,
Deputy Clerk.

(Indorsed:) Gen. No. 1180. District court of the United States, district of Colorado. Frank Adams, rec'r, &c., *vs.* J. B. Shepard. Bond for costs, $500.00. Filed this 28 day of January, A. D. 1896 Francis W. Tupper, clerk.

20 *Writ of Error to District Court U. S., District of Colorado.*

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

The President of the United States to the judges of the district court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, between Frank Adams, receiver of the Commercial National Bank of Denver, plaintiff, and J. B. Shepard, defendant, a manifest error hath happened, to the great damage of the said J. B. Shepard, defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 25th day of February next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 28th day of January, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the 120th year.

Seal United States District Court, District of Colorado.

FRANCIS W. TUPPER, *Clerk.*

Allowed by—
MOSES HALLETT, *Judge.*

21 [Endorsed:] Gen. No., 1180. Supreme Court of the United States. J. B. Shepard, plaintiff in error, *vs.* Frank Adams, receiver of the Commercial National bank. Writ of error to district court U. S., district of Colorado. Filed in district court of the U. S. this 28th day of Jan'y, A. D. 1896. Francis W. Tupper, clerk, by —— ——, deputy clerk. Doud & Fowler, attorney- for plaintiff in error.

Return.

THE UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In obedience to the command of the within writ I herewith transmit to the honorable the Supreme Court of the United States a duly

certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said district court, at Denver, in said district, this fourth day of February, 1896.

[Seal United States District Court, District of Colorado.]

FRANCIS W. TUPPER, *Clerk*,
By CHARLES W. BISHOP,
Deputy Clerk.

22 *Citation.*

U. S. — Court.

THE UNITED STATES OF AMERICA, }
District of Colorado, } ss:

The United States of America to Frank Adams, receiver of the Commercial National Bank of Denver, Greeting:

You are hereby cited and admonished to be and appear at Supreme Court of the United States, to be holden at Washington, on the 25th day of February next, pursuant to a writ of error filed in the clerk's office of the district court of the United States, wherein J. B. Shepard is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the district court of the United States for the district of Colorado, this 28th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

MOSES HALLETT, *Judge.*

23 [Endorsed:] Gen. No., 1180. — court of the United States, district of Colorado. J. B. Shepard, plaintiff in error, *vs.* Frank Adams, rec'v'r, &c., defendant in error. Citation. Filed in district court of the U. S. this 29 day of January, A. D. 1896. F. W. Tupper, clerk, by —— ——, deputy clerk. Doud & Fowler, attorneys for plaintiff in error.

Proof of Service.

THE UNITED STATES OF AMERICA, }
District of Colorado, } ss

On this — day of ——, A. D. 18—, personally appeared —— —— before me, the subscriber, a clerk of the — court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to —— ——.

DENVER, COLORADO, *January 30th*, 1896.

We acknowledge service of copy of citation in the above entitled cause and accept service of said citation hereby.

THOMAS, BRYANT & LEE,
Attorneys for Plaintiff, Frank Adams, Receiver of the Commercial Nat. Bank of Denver.

Sworn to and subscribed before me this — day of ——, A. D. 18—

—— ——, *Clerk*,
By —— ——,
Deputy Clerk.

21 UNITED STATES OF AMERICA, } ss.
District of Colorado, }

I, Francis W. Tupper, clerk of the district court of the United States for the district of Colorado, do hereby certify the above and foregoing pages, numbered from one to 19, both inclusive, to be a true, perfect, and complete transcript and copy of the record and proceedings and of all thereof heretofore filed or had and entered of record in said court and in a certain cause lately in said court pending, wherein Frank Adams, receiver of the Commercial National Bank of Denver, was plaintiff and J. B. Shepard was defendant, as fully and completely as the same still remain on file or of record in my office at Denver.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this fourth day of February, A. D. 1896.

[Seal United States District Court, District of Colorado.]

FRANCIS W. TUPPER, *Clerk*,
By CHARLES W. BISHOP,
Deputy Clerk.

25 In the Supreme Court of the United States.

J. B. SHEPARD, Plaintiff in Error,
vs.
FRANK ADAMS, Receiver of the Commercial National Bank of Denver, Defendant in Error. } Stipulation.

It is hereby stipulated by and between the attorney for the plaintiff in error and the attorneys for the defendant in error that the certificate heretofore issued by the judge of the district court of the United States in and for the district of Colorado, certifying the alleged question of jurisdiction in this cause to the Supreme Court of the United States for decision, may now be filed in the office of the clerk of the Supreme Court of the United States and made a part of the record in said above entitled cause, the same as if it had been sent up by the clerk of the district court of the United States

for the district of Colorado at the same time that the record now on file in said Supreme Court was sent up by him.

T. J. O'DONNELL,
Att'y for Plaintiff in Error.
C. S. THOMAS,
W. H. BRYANT,
THOMAS, BRYANT & LEE,
Att'ys for Defendant in Error.

26 UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the District Court of the United States within and for said District, November Term, A. D. 1895.

FRANK ADAMS, Receiver of the Commercial National Bank of Denver, Plaintiff,
vs.
J. B. SHEPARD, Defendant. } Certificate.

Present: The Honorable Moses Hallett, judge.

The following is a statement of the condition of the process and pleadings in the above-entitled action:

The action is upon a promissory note. Complaint therein was filed in said court on August 24th, 1895. A summons was issued by the clerk of said court on said day in pursuance of rule three of said court; which said summons was served upon the defendant by the marshal on August 27th, 1895, by delivering a true copy of said summons to the defendant, in Denver, Colorado. Said summons was in the words and figures following, to wit:

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the District Court of the United States for the District of Colorado.

FRANK ADAMS, Receiver of the Commercial National Bank of Denver, Plaintiff,
versus
J. B. SHEPARD, Defendant.

Complaint filed in the clerk's office this 24th day of August, A. D. 1895.

27 The President of the United States of America to J. B. Shepard, Greeting:

You and each of you are hereby notified that an action has been brought in said court by Frank Adams, receiver, the plaintiff, against you, as defendant, to recover the sum of $21,200.14, due from defendant to plaintiff on a certain promissory note made and delivered by defendant to the Commercial National Bank of Denver for

the sum of $20,000, dated at Denver, Colorado, June 7th, 1893, together with interest on said sum from August 24th, 1895, as more fully set forth and described in the complaint filed herein, and to which reference is here made, and for cost of suit.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, for said sum of $21,200.14, interest as aforesaid, and costs.

Witness the Honorable Moses Hallett, judge of the district court of the United States for the said district, and the seal thereof, at the city of Denver, in said district, this 24th day of August, A. D. 1895, and of the Independence of the United States the 120th year.

Seal Dist. Ct. U. S., Colo.

FRANCIS TUPPER, *Clerk*,
By —— ——, *Deputy Clerk*.

Within ten days after the service of said summons, and on, to wit, the 4th day of September, 1895, the defendant in said action appeared specially for the purpose of making a motion to quash said summons only, and filed in said court such motion in the words and figures following, to wit:

28

UNITED STATES OF AMERICA, } ss.:
District of Colorado, }

In the District Court of the United States within and for said District.

FRANK ADAMS, Receiver of the Commercial National Bank of Denver, Plaintiff,
vs.
J. B SHEPARD, Defendant.

Comes now the defendant, appearing specially, by Doud & Fowler, his attorneys, and moves the court to quash the summons heretofore issued herein for the following reasons:

First. Said summons is not such a summons as provided for by the statutes of Colorado. The said summons is made returnable and requires the defendant to appear and answer in this action in this court within ten days from the day of the service of said summons, instead of thirty days, as provided by the statutes of Colorado.

Second. The copy of said summons served upon said defendant is not certified to as a true copy by the clerk of this honorable court.

DOUD & FOWLER,
Att'ys for Def't.

Thereafter, on, to wit, the 4th day of January, A. D. 1896, the court, upon hearing argument of counsel, but without rendering any decision, overruled said motion; said defendant thereupon elected to stand by said motion, and the court thereupon rendered judgment in favor of plaintiff and against defendant, according to the prayer of the complaint.

29 Thereafter, on, to wit, the 28th day of January, A. D. 1896, this defendant petitioned the court for a bill of exceptions, which was allowed; and thereafter, upon said day, a writ of error was granted to the defendant to the Supreme Court of the United States, and a citation was duly signed and served.

Thereupon, upon request of the defendant and in compliance with statute of United States in such cases made and provided, the question as to whether said summons was in compliance and accordance with the provisions of the statute of the State of Colorado relating to "process," as it is provided by the statute of the United States it should be, the same being the sole and only question in said cause, is hereby certified to the Supreme Court of the United States for decision, and it is hereby ordered that the clerk of this court do transmit this certificate, together with the record of this cause and the bill of exceptions, the writ of error, cost bond, and the citation, to the Supreme Court of the United States, for the purpose of having said court determine said question as to whether said summons is in compliance with the aforesaid laws, and for the purpose of the prosecution of said writ of error so allowed.

And it is done accordingly this 28th day of January, A. D. 1896.

MOSES HALLETT, *Judge.*

30 (Indorsed:) 1180. No. —. District court of United States, district of Colorado. Frank Adams, receiver, *vs.* J. B. Shepard. Certificate of judge as to jurisdictional question. Doud & Fowler, att'ys for defendant. Filed Mar. 25, 1896. Francis W. Tupper, clerk.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss.*:

I, Francis W. Tupper, clerk of the district court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of a certificate of the judge of said court as to the fact that a jurisdictional question was involved in this case heretofore filed in said court and in a certain cause lately in said court pending, wherein Frank Adams, receiver of the Commercial National Bank of Denver, was plaintiff and J. B. Shepard was defendant, as fully and completely as the same still remains on file in my office.

Seal United States District Court, District of Colorado.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 28th day of March, A. D. 1896.

FRANCIS W. TUPPER, *Clerk*.

31 [Endorsed:] Case No. 16,198. Supreme Court U. S., October term, 1895. Term No., 908. J. B. Shepard, P. E., *vs.* Frank Adams, receiver, &c. Stipulation and addition to record. Filed April 11, 1896.

Endorsed on cover: Case No. 16,198. Colorado D. C. U. S. Term No., 134. J. B. Shepard, plaintiff in error, *vs.* Frank Adams, receiver of the Commercial National Bank of Denver. Filed February 20, 1896.

(16,198)

Supreme Court of the United States

OCTOBER TERM, 1897.

No. 134.

J. B. SHEPARD, PLAINTIFF IN ERROR,

vs.

FRANK ADAMS, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF DENVER.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

On August 24, 1895, the defendant in error filed his complaint in an action at law upon a promissory note in the District Court of the United States for the District of Colorado, and sued out of said court what was called a writ of summons against the plaintiff in error. The so-called summons was served on the defendant within the county of Arapahoe, Colorado, on August 27, 1895. The statutes of Colorado at the time said summons was issued and served, and at all times since then, prescribed that "the summons shall state the parties to the action, the state, county and

court in which it is brought, and require the defendant to appear and answer the complaint within *twenty days*, if served in the county in which the action is brought. * * * If a copy of the complaint be not served with the summons * * * *ten days additional* to the time specified in the summons shall be allowed for appearance and answer." The summons in question was such a writ as was prescribed by this statute of Colorado, except in this one particular, that it required the defendant named therein "to appear and demur or answer to the complaint filed in said action in said court *within ten days* (exclusive of the day of service) after" service thereof, if served within the county of Arapahoe, instead of allowing him *thirty days* after service of summons (no copy of the complaint having been served) in which to appear.

It was not through inadvertence that the time for appearance and answer was curtailed to ten days, but by reason of a general rule and settled policy of the Federal District Court. Under a rule adopted October 10, 1877, and ever since in force, a summons issuing from that court, in cases like the one at bar, must require the defendant to appear and answer in *ten days* after service. This rule was so framed that, at the time of its adoption, it complied, in this and in all other particulars, with the statute of Colorado, adopted March 17, 1877. When the Colorado statute was changed by the state legislature, in 1889, and the summons thereby required to allow *twenty days*, and if no copy of the complaint was served, *ten days additional*, for the appearance of defendants, the Federal District Court for Colorado did not change its rule of October 10, 1877. It has ever since maintained it, regardless of the state statute.

On September 4, 1895, and within ten days after the service of the summons in this case, the defendant in the court below, appearing specially for that sole purpose, filed a motion to quash the summons, and alleged as ground for said motion that the summons was not such a summons as is prescribed by the statutes of Colorado. This motion was denied, November 5, 1895, and, the defendant refusing to answer or plead, default was entered and judgment rendered against him, according to the prayer of the complaint. A bill of exceptions was granted and signed and a writ of error allowed to this court.

The question certified to this court by the said District Court for decision is, "As to whether said summons was in compliance and accordance with the provisions of the statute of the state of Colorado relating to 'process,' as it is provided by the statute of the United States it should be."

SPECIFICATION OF ERRORS.

The plaintiff in error relies upon the following errors assigned:

First—That the court erred in overruling the defendant's motion to quash the summons issued herein.

Second—That the court erred in rendering judgment against the defendant, according to the prayer of the plaintiff's complaint.

BRIEF OF ARGUMENT.

I.

The question is one of jurisdiction: the Supreme Court and not the Circuit Court of Appeals is the proper tribunal to review this cause.

Section 5 of the Appellate Courts Act of March 3, 1891, provides: "That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

"1. In any case in which the jurisdiction of the court is in issue; in which cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision, etc."

Had not the district judge expressed the belief, at the time he signed the bill of exceptions, that the question involved here was not within the meaning of the term "jurisdiction," as used in the above act, no authorities would have been cited here upon that point.

This court, in United States vs. Arredondo, 6 Pet., 709, said: "The power to hear and determine a cause is jurisdiction." No such power exists in a personal action without jurisdiction of the court over the person of the defendant. The mode of obtaining jurisdiction of defendants prescribed by the Code is exclusive. If it is not followed, the court has no jurisdiction over the defendant and is therefore powerless to hear and determine the cause. This has been clearly recognized by this court in many decisions. In Rhode Island vs. Massachusetts, 12 Pet., 657, 718, it was said: "Jurisdiction is the power to hear and determine the subject-matter in controversy *between parties to a suit*, to adjudicate or exercise any judicial power over them." There (page 721) the initial question considered by the court, and the one which it said must be determined before it could proceed with the cause, was whether the court had jurisdiction of the parties.

In Earle vs. McVeigh, 91 U. S., 503, 507, this court decided that the judgment there reviewed was void, because the service of summons was not in compliance with the state statute, and said: "Standard authorities lay down the rule that in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and subject-matter."

Brown, in his work on Jurisdiction, says (section 5): "Jurisdiction may be divided into three elementary parts. The court must have jurisdiction over the subject-matter of the suit or controversy; it must have jurisdiction over the person of the defendant; and if the action concerns a thing, it must have jurisdiction over the thing."

In Wells on Jurisdiction, page 71, it is said: "Where a statute prescribes the mode of obtaining personal jurisdiction, it must be strictly pursued or the proceeding will be a nullity, whether in a superior or inferior court, and as utterly void, indeed, as if it undertook to adjudicate where it had no jurisdiction of the subject-matter."

The Supreme Court of Indiana held in Robertson vs. State, 10 N. E. Rep., 582, that "Two things are absolutely essential to the power of a court to decide a legal controversy: jurisdiction of the subject-matter and jurisdiction of the person. Both must exist, otherwise it is the imperative duty of the court to decline to do more than ascertain and declare that it has no power to examine or decide the merits of the controversy."

The Circuit Court of Appeals for the sixth circuit, in U. S. vs. Swan, 65 Fed. Rep., 647, 649, decided

that the first paragraph of the act of March 3, 1891, quoted above, did not apply to a question of whether a suit could be entertained on the equity or the law side of a Federal District or Circuit Court, but applied only "to the initial questions of the jurisdiction" of such courts "over the subject-matter *and parties.*"

The Supreme Court of the United States, in So. Pac. Co. vs. Denton, 146 U. S., 202, reviewed, upon a writ of error granted under the Court of Appeals act, the question of the lower courts' jurisdiction over the defendant.

This court also, while not directly deciding the point in issue here, In re Atlantic City R. Co., 17 U. S. Sup. Ct. Rep., 208, recognized the question of the jurisdiction of the court over the defendant, as such a question of jurisdiction as is meant by the Circuit Court of Appeals act.

All "jurisdiction," as the word is used in the part of the act above quoted allowing writs of error directly from the District or Circuit Courts to the Supreme Court, is necessarily the "jurisdiction" of some court; and the words "of the court" added to "jurisdiction" in the act in no way change or limit the general meaning of the term. It is necessary to the "jurisdiction of the court" that it have jurisdiction of the person as well as the subject-matter.

The Circuit Court of Appeals for the seventh circuit, in Davis & Rankin Co. vs. Barber, 60 Fed. Rep., 465, held that where the jurisdiction of the lower court was the only matter in issue, the Court of Ap-

peals had no jurisdiction on appeal or writ of error, and that the case should have been taken directly to the Supreme Court.

It seems clear that the question here is one of jurisdiction within the Circuit Court of Appeals act; and that this court has exclusive jurisdiction of this cause on writ of error.

II

"The writ of summons issued by a Federal District Court should conform to the state statute."

Section 914 of the Revised Statutes of the United States (act of 1872) provides, that "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

The form and substance of the writ by which a court acquires jurisdiction of the person of the defendant is clearly a matter of "practice" and of "form and mode of proceeding," and so within the purview of section 914.

In Amy vs. Watertown, 130 U. S., 301, 302, it was stated that "The principal question in this case is, whether the defendant, the city of Watertown, was served with process in the suit so as to give the court below jurisdiction over it;" and it was said, (page 304): "There can be no doubt, we think, that the mode of service of process is within the categories

named in the act." The form and substance of the process itself is as clearly a matter of "practice, pleading and form and modes of proceeding" as the mode of service of the process.

In the Watertown case this court decided that "the statute of 1872 (section 914) is peremptory, and whatever belongs to the three catagories of practice, pleading and forms and modes of proceeding, must conform to the state law and the practice of the state courts, except where congress itself has legislated upon a particular subject and prescribed a rule." (Page 304.)

Furthermore, this court there held (page 320): "Here we are bound by statute and not by the state statute alone, but by the act of congress, which obliges us to follow the state statute and state practice. The federal courts are bound hand and foot, and are compelled and obliged by the federal legislature to obey the state law."

The purpose of the act of 1872, of which section 914 is a part, was to bring about uniformity in the procedure of the federal and state courts of the same locality. (Nudd vs. Burrows, 91 U. S., 426, 441.) If the District Court can arbitrarily maintain its rule under which the time of defendant's appearance in the summons in this case was limited to ten days, when the Colorado Code of Procedure provides thirty days, it can disregard all the practice provisions of the state Code. The result would be, great confusion and inconvenience. This court, in Nudd vs. Burrows, *supra*, in discussing section 914, said (page 441): "It had its origin in the Code enactments of many of the states. While in the federal tribunals

the common law pleadings, forms and practice were adhered to, in the state courts of the same district the simpler forms of the local Code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it."

The case at bar comes within both the letter and the reason of the act of 1872.

In the following decisions of this court it has been held that section 914 applies to, and that the state statute therefore governs:

The method of service of process on an agent of a foreign corporation:

McCormick Harvester Mach. Co. vs. Walters, 134 U. S. 41.

Societe, etc., vs. Milliken, 135 U. S., 304, 307.

The mode of service of summons by posting:

Earl vs. McVeigh, 91 U. S., 503, 507.

The filing of amended petitions:

Henderson vs. Louisville R. Co., 123 U. S., 61.

The construction of pleadings:

Robertson vs. Perkins, 129 U. S., 233.

The sufficiency of pleadings:

Roberts vs. Lewis, 144 U. S., 653.

The bringing of suit by the real party in interest:

Arkansas Smelting Co. vs. Belden Co., 127 U. S., 379, 387 (Colo.).

Delaware Co. vs. Diebold Safe Co., 133 U. S., 473, 488.

The federal Circuit and District Courts have generally recognized the binding force of section 914 in matters like the one under consideration. In the cases cited below they have held that it applied, and the state statute, therefore, controlled:

What the summons should contain:

An indorsement (required by New York statute) of a reference to the statute under which a suit for penalty was brought—was omitted, and the summons, therefore, was void.

U. S. vs. Rose, 14 Fed. Rep. 681.

The validity of service of process:

The federal court, it was said in the case cited below, has no more power to authorize any mode of service, other than that provided by the state statute, than have the state courts. "The mode of service prescribed by the state law must be followed, and the power of this court to prescribe or substitute any other mode is necessarily abrogated."

Perkins vs. Watertown, 5 Bissell, 320.

The requirements for opening judgment taken by default:

Republic Insurance Co. vs. Williams, 3 Bissell, 370.

The time of giving notice for a hearing:

Rosenback vs. Dreyfuss, 2 Fed. Rep., 23.

The time of filing pleadings:

Ricard vs. Inhabitants, etc., 5 Fed. Rep., 433.

The verification of pleadings:

Collier vs. Stimson, 18 Fed. Rep., 689.

The issuance of the writ of replevin, which was not allowed by the state statute of Virginia:

Baltimore & Ohio R. Co. vs. Hamilton, 16 Fed. Rep., 181.

The District Court had no power to issue a summons which directly contravened the explicit and mandatory provisions of both the federal and state statutes. Section 914 bound it to comply with the state statute as completely as any state court is bound by the state statute.

III.

The so-called summons in this case was a nullity, and did not confer upon the District Court any jurisdiction over the defendant.

The summons in question was issued August 24, 1895. (Transcript of Record, page 3.) Section 34

of the Colorado Code of Procedure, in force at that time, and ever since, was enacted, in its present form, in 1889, and is as follows:

"Sec. 34. The summons shall state the parties to the action, the state, county and court in which it is brought, and require the defendant to appear and answer the complaint within *twenty days* after the service of summons, if served in the county in which the action is brought; or if served out of such county or by publication, within thirty days after the service of summons, exclusive of the day of service or that judgment by default will be taken against him according to the prayer of the complaint, and shall briefly state the sum of money or other relief demanded in the action; but the summons shall not be considered void or erroneous on account of an insufficient statement of the relief demanded, unless the same is manifestly misleading. If a copy of the complaint be not served with the summons, or if the service be made out of the state, *ten days additional* to the time specified in the summons shall be allowed for appearance and answer, but the form of the summons shall be the same in all cases." (Transcript of Record, page 6.)

The Supreme Court of Colorado has decided that this section of the Colorado Code, before its amendment in 1889, was mandatory, and that a summons which did not comply with it was void. The amendment of 1889 did not change its mandatory character.

Smith vs. Aurich, 6 Colo., 388, 390.

A. T. & S. F. R. R. Co. vs. Nicholls, 8 Colo., 188, 191.

In each of the cases cited above the summons did not state "the cause and general nature of the action," as required at that time by this section of the Code. It was, therefore, held that the summons was a nullity and did not confer any jurisdiction upon the court issuing it. At the time these cases were decided by the Supreme Court of Colorado, the Code provision, in positive and peremptory terms, required that the summons should state "the cause and general nature of the action." The amendment of 1889 wholly omitted that particular requirement, and further provided that the "summons shall not be considered void or erroneous on account of an insufficient statement of the relief demanded, unless the same is manifestly misleading." But in respect to the time of answering, the amended act of 1889 is as positive and peremptory in its language, as was the prior act in providing that the cause of action should be stated in the summons. The language construed by the state Supreme Court in the decisions cited above was: "The summons shall state * * * the cause and general nature of the action." The language of the act of 1889, upon which plaintiff in error relies, is: "The summons *shall state* the parties, etc. * * * and *require* the defendant to appear and answer the complaint within twenty days. * * * If a copy of the complaint be not served with the summons * * * ten days additional to the time specified in the summons *shall be allowed* for appearance and answer."

It is plain that the amendment of this section in 1889 does not in any way warrant an inference that the Supreme Court of the state would construe the present statute as otherwise than mandatory, or

would consider it less essential that the summons should comply with the statute.

In Burkhardt vs. Haycox, 19 Colo., 339, that part of the present act relating to the statement of cause of action in the summons was construed; the summons there under consideration clearly complied with the act of 1889, and was held to be good, but nothing was there said which militates against the former decisions of the court, in Smith vs. Aurich, and A. T. & S. F. R. R. Co. vs. Nicholls, *supra*.

That the Supreme Court of the United States will, in the construction of state statutes, follow the adjudications of the highest court of such state, is too well settled to require citation of the cases so holding.

Could any Colorado state court maintain the validity of the summons in this case? The statute is mandatory. Its mandate is that the summons "shall require the defendant in such cases to appear and answer within *thirty days*. This summons requires appearance and answer in *ten days*. If the time could be so changed, it could be made one day. If the time could be changed, any other requirement could also be changed—all others could be changed. The summons would thus become the creature of the whim and caprice of the court issuing it. It would no longer be statutory.

In Smith vs. Aurich, *supra*, the Colorado Supreme Court cited with approval Lyman vs. Milton, 44 Cal., 630, in which case the caption of the summons omitted the name of one of the defendants, and in lieu of the name the words "et al." were inserted. The California Supreme Court held the Code provis-

ion requiring the summons to state "the parties" to be mandatory, and it was said that if any one statutory requirement might be omitted, all might be omitted. The Colorado court adopted this reasoning.

The state Supreme Court has decided that while said section of the Code is mandatory, still a substantial compliance therewith is sufficient. (Kimball vs. Castagnio, 8 Colo., 525.) The defect in that case was merely formal--the omission of the words "judgment by" before "default." The meaning was the same and the summons was sustained.

In the case at bar there is not a substantial compliance with this section of the Code. There is a direct violation of its express terms. The most important office of a summons is to command the defendant to appear and answer the plaintiff. The Colorado Code says that command shall be to appear within thirty days. This is the initial command in the suit. It lies at the very threshold. If courts are not bound to make this command comply with the statute, they may omit from the summons all things required by the statute; they may change it in every particular prescribed.

In Smith vs. Aurich, *supra*, the state Supreme Court very clearly indicates *its opinion on the particular point in issue on this review*. It cites with approval, and as one of the authorities upon which it bases the decision that the summons in that case was void, the case of Hochlander vs. Hochlander, 73 Ill., 618. That was a case in which the *time for answer* stated in the summons was different from that required by the Illinois statute; it was not returnable to the next term after its date, as the statute provided. The summons

was held, for that reason, to be without force and to confer no jurisdiction. It is manifest that the decisions of the Colorado court of last resort condemn the summons in the case at bar.

There is a decided preponderance of authority in favor of the proposition that statutory provisions specifying what the summons shall contain are mandatory and must be complied with, or the summons is void.

Wells on Jurisdiction of Courts, section 82, page 71.

Brown on Jurisdiction, section 41, page 109.

In each of the following cases the summons was held to confer no jurisdiction because of the violation of the statutory provisions in the particulars mentioned:

Culver vs. Phelps, 130 Ill., 217.

Returnable at time other than that provided by statute.

Simmons Bros. vs. Cochran, 29 S. C., 31.

Time for appearance more than twenty days from date. It is said in this decision: "If a trial justice had the right to disregard the act as to the time fixed in the summons for a day or for three days, as here, why not also for a month or year?"

Adkins vs. Moore, 20 S. E. (S. C.), 985.

Statutory time for appearance and answer changed.

Joiner vs. Delta Bank, 14 So. (Miss.), 464.

Returnable instanter instead of on first day of term.

Miner vs. Francis, 58 N. W. (N. D.), 343.

No time for appearance specified. Code required "seven days after service."

Raub vs. Otterback, 16 S. E. (Va.), 933.

Returnable "before the ..... of our said Circuit Court" in nine days instead of ten.

Pantall vs. Dickey, 16 A. Rep. (Pa.), 789.
Mead vs. Hartwell, 31 N. Y. S. Rep., 675.

Returnable at other than the statutory time.

Hodges vs. Brett, 4 G. Greene (Iowa), 345.
Gas Co. vs. Wheeling, 7 W. Va., 22.
Briggs vs. Snegan, 45 Ind., 154.
Shirley vs. Hager, 3 Blackf. (Ind.), 225.
Carey vs. Butter, 11 Ind., 391.
Fuller vs. Ind., etc., R. Co., 18 Ind., 91.

Time for defendant's appearance a departure from that provided by statute.

Crowell vs. Galloway, 3 Neb., 215.

Returnable on *first* Monday after date of summons instead of *second* Monday. The court said: "No discretion is vested in either the clerk or the court in respect to the return or answer days, and if the plain requirements of the statute be disregarded, it is the right of the defendant to object, and thus challenge the jurisdiction of the court over him," and if not for subsequent appearance these facts "would call for reversal of the judgment."

Sidwell vs. Schumaker, 99 Ill., 426, 433.
Forbes vs. Darling, 94 Mich., 621, 625.
McLendon vs. State, 92 Tenn., 520, 523.

Writ did not run in name of The People of the State.

Insurance Co. vs. Holland, 6 Wall., 556.
Choat vs. Spencer, 40 Am. St. Rep. (Mont.), 425.

Seal of court omitted from the writ.

It seems clear to us that any court of the state of Colorado must have quashed such a summons as was issued in this case—must have held it to be a nullity. If so, the Federal District Court ought to have granted the motion to quash. It had no jurisdiction to render judgment against defendant. As was said in Amy vs. Watertown, 130 U. S., 302, in such matters as this: "The federal courts are bound hand and foot, and are compelled and obliged by the federal legislation to obey the state law."

When the District Court for Colorado adopted its rule 3 (Transcript of Record, page 5) providing that the summons should require the defendant to answer in ten days, it was so done in compliance with the Code of Colorado of 1877. (Transcript of Record, page 6.) Section 914 of Revised Statutes of United States then required that the rule should conform to the state statute. If it was incumbent upon that court to make its summons conform to the state satute then, it is now. The fact that by this rule it has overridden the statute for many years does not make the rule right or lawful; does not make a summons in violation of the statute valid.

IV.

The special appearance of defendant in the court below was not a waiver of the illegality of the summons.

Harkness vs. Hyde, 98 U. S., 476.

Mexican Cent. R. R. Co. vs. Pinkney, 149 U. S., 194, 209.

Goldey vs. Morning News, 156 U. S., 518.

It is respectfully submitted that the summons in this case did not confer upon the District Court jurisdiction over the defendant below, and that the judgment should therefore be reversed.

T. J. O'DONNELL,
DOUD & FOWLER,
Attorneys for Plaintiff in Error.

No. 134.

Reply Brf. of O'Donnell for P.

134

Filed Nov. 29, 1897.

(16,198)

Supreme Court of the United States

OCTOBER TERM 1897.

J. B. SHEPARD, PLAINTIFF IN ERROR,

vs.

FRANK ADAMS, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF DENVER.

REPLY BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

T. J. O'DONNELL,
DOUD & FOWLER,
Attorneys for Plaintiff in Error.

THE SMITH-BROOKS PRINTING CO., DENVER, COLO.

(16,198)

Supreme Court of the United States

OCTOBER TERM, 1897.

J. B. SHEPARD, PLAINTIFF IN ERROR,

vs.

FRANK ADAMS, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF DENVER.

REPLY BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

I.

It is contended on behalf of defendant in error that the question involved in this case is not one of "jurisdiction of the court," within the meaning of the Circuit Court of Appeals act. In support of that contention three decisions of this court are cited, namely:

Smith vs. McKay, 161 U. S., 355.

Cary vs. Railway Co., 161 U. S., 115.

Murphy vs. Colorado Paving Co., 166 U. S., 714.

We submit that none of these cases are in point. In the first one, Smith vs. McKay, the supposed question of jurisdiction was whether the lower court should have entertained the complainant's bill in equity. The contention of appellants there was that the case made out was one at law. This court held that such a question was not one of jurisdiction within the meaning of the above mentioned act. The language found near the bottom of page 358 of said 161 U. S., *if taken alone*, gives some color to counsels' claim, that it is applicable in this case. It is there said that "when the requisite citizenship of the parties appears, and the subject matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that court attaches." The meaning of this language is controlled by the facts on which it is based. It appears from the decision itself that there was no question in that case as to the jurisdiction of the court over the defendant. It was admitted that defendant was in court. On page 357, in stating the position of appellee in that case, the court said: "If the Circuit Court has jurisdiction of the parties and of the matters in dispute, the fact that it is contended that it has no jurisdiction on its equity side raises no question of jurisdiction within the meaning of the act under which this appeal is taken." Furthermore, the court dismissed the appeal in that case on the express ground "that the objection was *not* to the *want of power* in the Circuit Court to entertain the suit, but to the want of equity in the complainants' bill." It is apparent that this court did not intend to say, and we think its language did not convey the idea, that the jurisdiction of the lower court attaches in *every* case "when the requisite citizenship of the parties appears and the subject matter is such that the Circuit Court is competent to deal with it," regardless of whether such court has obtained jurisdiction of the defendant or not. The question in the case at bar *is* one going to the "want of power" in

the District Court. There being no such question in the case cited by counsel for defendant in error, what was there said must be read in light of that fact. So read, there is nothing in the decision of Smith vs. McKay which tends to exclude a question of jurisdiction of the defendant from consideration by this court on a writ of error brought under the Circuit Court of Appeals act. Indeed, it is a fair inference from that case that, as the question here *is* one of "want of power" over defendant, that this court has jurisdiction of this review.

The second case, Cary vs. Railway Co., as we understand it, merely holds that in the original suit, the Federal Court had jurisdiction because of diverse citizenship; and in a suit which was ancillary to that, the Federal Court retained its jurisdiction; and under the express terms of the Circuit Court of Appeals act, the Circuit Court of Appeals had final jurisdiction in that case, because the jurisdiction depended upon the diverse citizenship of the parties only. We think such a case has no bearing on the case at bar.

No opinion of the court is reported in the third case cited, that of Murphy vs. Colorado Paving Co. It is said, however, that the appeal was dismissed upon the authority of Smith vs. McKay.

Jurisdiction of the court over the defendant is *one* of the two coördinate elements of jurisdiction. There is nothing in the cases cited on behalf of defendant in error, and considered above, which in any way limits the meaning of the phrase "jurisdiction of the court," as used in the Circuit Court of Appeals act, to the *other* coördinate element of jurisdiction, namely, jurisdiction of the subject matter. There is nothing in the act itself which indicates that the word "jurisdiction," as used in the act, has any other than its usual meaning. So used, it clearly includes both branches of jurisdiction.

We submit that the question as to whether the District Court, by its so-called summons, obtained jurisdiction over the defendant, is a question of jurisdiction within the meaning of the Circuit Court of Appeals act.

II.

It is not our contention, as counsel say they understand it to be, that the lower court might have power to fix a longer, but not a shorter period for answer than that prescribed by the Colorado Code. Neither is it our contention, as counsel seem to believe, that the Colorado Code controls "forms and modes of proceeding" in such particulars as have been directly regulated by the act of Congress. We contend that the Federal District and Circuit Courts must make their practice conform to that of the States in which they are located, in all substantial particulars in which Congress has not directly regulated such forms and modes of proceeding. Congress has not, directly, provided what the summons shall contain in a common law action. It has indirectly done so in said section 914. It has not fixed the time for answering that shall be inserted in a summons, except as it has done so in section 914. But by this section, Congress says clearly that the "forms and modes of proceeding," in cases like the one at bar, shall conform as near as may be to the practice, pleadings and forms of the State.

It is thus clearly provided, by act of Congress, what the summons shall contain. The summons in question is in violation of the State law, and so in violation of the act of Congress.

Counsel for defendant in error point out that a summons under the State Code may be issued by the plaintiff's attorney. This, they say, can not be done in the Federal Courts. That is true, because section 911 of the Revised Statutes of the United States expressly provides

that the summons must be under the seal of the court, signed by the clerk, and bear teste of the judge. It has been repeatedly decided by the Federal Courts that a summons issued in violation of said section 911 of the Revised Statutes is void and does not confer jurisdiction. It is just as clear that a summons issued in violation of section 914 of the Revised Statutes fails to confer jurisdiction.

In the case of The Indianapolis Railroad Company vs. Horst, 93 U. S., cited by counsel for defendant in error, the question was not clearly one of "forms and modes of proceeding." The question there was, whether the Federal judge was compelled to instruct the jury to make special findings upon particular questions of fact; and it was held by the court that section 914 was not intended "to fetter the judge in the personal discharge of his accustomed duties or trench upon the common law powers with which in that respect he is clothed," and that that section was not intended to control the manner in which the judge should discharge his duties in charging the jury. The later case of Amy vs. Watertown, 130 U. S., 301, cited by us in our opening brief, is much more clearly in point than the case of Indianapolis Railroad Company vs. Horst.

In the later case the nature of the question involved is identical with the question in the case at bar, and it was there said that in such matters "the Federal Courts are bound hand and foot, and are compelled and obliged by the Federal legislature to obey the State law."

The case of St. Clair vs. United States, cited by counsel for defendant in error, was a criminal case, and section 914 is expressly limited in its application to civil cases. The case can not be in point here. Counsel quote a portion of section 918, Revised Statutes, to the effect that the Federal Courts may "regulate their own practice

as may be necessary or convenient," etc. But it is clear from a reference to the preceding portion of the section that it does not in any way conflict with section 914, because it is expressly stated that such regulation shall be in a "manner not inconsistent with any law of the United States."

Counsel for defendant in error mention some reasons why the rule of the Federal District Court in question is a wise one. Equally forcible reasons might be cited as to why it is unwise. But these reasons and arguments, it seems to us, are proper to be addressed to the legislature only. The Congress of the United States has said that the summons in such particulars as are not directly regulated by it, shall conform to the State statute, and the summons in question fails to do that in a substantial particular. It is not a summons authorized by any law whatever. It is, therefore, not a summons. It is a nullity.

Counsel cite the following cases of the Federal Circuit or District Courts in support of their proposition that these courts have the right to regulate their process.

Middleton Paper Co. vs. Rock River Paper Co., 19 Fed., 252.

Lowry vs. Stors, 31 Fed. Rep., 769.

Schwabacker vs. Reilly, 2 Dillon, 127.

Martin vs. Chriscuola, 10 Blatch., 211.

The first case, the Middleton Paper Co. vs. Rock River Paper Co., involved the question of whether a garnishee summons issued by the plaintiff's attorneys, instead of by the clerk of the court, was valid or not. It was held that section 911 of the Revised Statutes made it necessary that the summons should be issued by the clerk and should bear the teste of the judge, and it was said that in other respects than these, all writs of the court "are in substance and form as prescribed

by the laws of the State." Under this authority, the summons in the case at bar should have conformed to the State Code. In the Middleton case, after it was held that the summons was not valid, a motion was made to amend the summons by having it signed and tested as provided by section 911. The court denied the motion and said that there was *nothing* to amend. The garnishee summons issued in violation of section 911 was a nullity. Such a summons was not process, either regular or irregular. This reasoning is applicable to the case at bar.

The case of Lowry vs. Stors, cited on behalf of defendant in error, involved a motion to collect a penalty in the Federal Court from its marshal, which penalty was imposed by a State statute. This, it was held, could not be done. Then the court, after expressly stating that its further opinion was not necessary to the decision of the case, proceeded to a discussion of the question as to whether its rule that a summons must be served by leaving a copy thereof with the defendant, was valid, when it was provided by the State statute that the summons might be served by reading to the defendant. And in this obiter discussion the court arrived at the conclusion that its rule was not a violation of the State statute or of section 914 of the Revised Statutes of the United States, "as it (the Federal Court's rule) *includes* the state mode of procedure and more effectually secures personal service on defendants." It thus appears that the rule of court in that case required service of summons in both ways, so there was no possible conflict.

Schwabacker vs. Reilly is also cited by counsel for defendant in error as authority for the Federal Courts to regulate their own process. That was a case in which the service of summons was by a private person instead of by the marshal, and the court pointed out that the

Judiciary Act of the United States made it the marshal's duty to serve the summons. Such a case is not an authority against the position that the summons must comply with the State Code, as section 914 says it shall.

The last case cited is that of Martin vs. Chriscuola. There it was decided that the action could not be commenced by issuance of summons by complainant's attorney. The whole case was governed by the express provisions of section 911 of the Revised Statutes. In such a case it could not be claimed that the State law governs.

We submit that the substance of the summons is not a matter of discretion with the Federal District and Circuit Courts, as suggested by counsel. It is not a matter under their independent direction. Such conformity with the State laws as the mandatory terms of section 914 require is essential. Where the provisions of that statute are overridden and the requirements of the State statute disregarded in substantial particulars, as was done in the summons in this case, jurisdiction of the defendant is not acquired.

Respectfully submitted,

T. J. O'DONNELL,
DOUD & FOWLER,
Attorneys for Plaintiff in Error.

No. 134.

Brief of Thomas & Bryant for D

Filed Nov. 22, 1897.

IN THE SUPREME COURT OF THE UNITED STATES.

J. B. SHEPARD,
Plaintiff in Error,
vs.
FRANK ADAMS, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF DENVER,
Defendant in Error.

134

Brief and Argument of Defendant in Error.

C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
Attorneys for Defendant in Error.

F. C. REID & CO., PRINTERS, 1409-11 LAWRENCE ST., DENVER.

IN THE SUPREME COURT OF THE UNITED STATES.

J. B. SHEPARD,
Plaintiff in Error,
vs.
FRANK ADAMS, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF DENVER,
Defendant in Error.

Brief and Argument of Defendant in Error.

We desire to make but two points in answer to the brief of the plaintiff in error in this case.

I.

NO WRIT OF ERROR LIES TO THIS COURT UNDER THE ACT CREATING THE CIRCUIT COURT OF APPEALS.

The question of the jurisdiction of the Court below within the meaning of that act is not involved in this case. There is no doubt that this case was one properly brought in the Federal Court, it being a suit by a receiver of a National Bank appointed under an act of Congress. Such a receiver is an officer of the United States, and a suit initiated by him is one arising under the Constitution and laws of the United States. The question of whether or not the Court acquired

jurisdiction by proper service of process is not one, we take it, which involves the jurisdiction of the Court within the meaning of that term as used in the act creating the Circuit Court of Appeals. We think the case is governed by that line of decisions holding that where the action is one clearly within the jurisdiction of a Federal Court, as distinguished from a State Court, the question of any error in its procedure, even though it challenges the authority of the Court over the defendant, is one which must be determined by the Circuit Court of Appeals.

Smith vs. McKay, 161 U.S., 355.
Cary vs. Railway Co., 161 U.S., 115.
Murphy vs. Colorado Paving Co., 166 U.S., 714.

II.

The Judgment of the Court Below Should Be Affirmed in Any Event.

This case was brought here to test the validity of the rule of the Circuit Court for the District of Colorado prescribing time for answering the complaint after the service of summons upon the defendant. The Code of Procedure of Colorado provides that where a summons is served upon a defendant within the county within which the action is brought, he shall have twenty days within which to answer, and if served out of the county, thirty days. By a rule of the Circuit Court of the United States, this time is changed so as to read that defendant shall have ten days within which

to answer if served within the county, and forty days if served without the county. It is claimed that as the service in this case was made within the county, the defendant is entitled to the twenty days prescribed in the Code. As we understand it, the contention is made that while the Circuit Court of the United States might possibly have the power to grant a longer period than that prescribed by the Code of Colorado, it has not the power to prescribe a shorter period. It is claimed that Section 914 of the Revised Statutes governs the Circuit Court in this particular, and that its rule is controlled by the State law. We don't think any such result follows.

In the first place, it has been laid down by this Court that the conformity required by Section 914 is, as near as may be, "not as near as may be *possible*, or as near as may be *practicable*. This indefiniteness may have been suggested by a purpose. It devolved upon the Judges to be affected the duty of construing and deciding, and gave them power to reject—as Congress doubtless expected they would do—any subordinate provision in said State statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice in their tribunals."

Indianapolis R. R. Co. vs. Horst, 93 U. S., 291.

And so this Court has held that the section does not apply in a great many particulars, and does not, in any way, shape or form, interfere with

the legitimate discretion and powers of the Circuit Courts in the administration of justice.

St. Clair vs. U. S., 154 U. S., 134, 153.

But so far as the issue and service of process is concerned, it is very evident that the provisions of the Colorado Code cannot prevail. The Code in the first place provides that civil actions may be commenced by the issuing of a summons or the filing of a complaint. The summons may be issued by the Clerk or by the plaintiff's attorney. It may be signed by the plaintiff's attorney. It is also provided that it may be served by a private person not a party to the suit; and the complaint need not be filed until ten days after the summons is issued.

Code of Civil Procedure, Secs. 32, 33, 34, 37.

It is very evident, under the provisions of Section, 911 and 918 of the Revised Statutes, that these provisions cannot prevail in the Federal Courts. All writs and process issuing from the Federal Courts must be under the seal of the Court and signed by the Clerk, and bear teste of the Judge of the Court from which they issue.

Revised Statutes of the United States, Sec. 911.

Under these conditions, the Circuit Court of the United States must make rules in regard to the commencement of an action differing from those provided for by the Code of Colorado, and, accordingly, in this Circuit the rule provides that suits can only be commenced by the filing of a complaint upon which summons shall issue, as prescribed by Section 911.

Under the Revised Statutes, the summons must be served by the Marshal. As to the return of the same, Section 918 gives to the Circuit Court direct power to make rules and orders over this matter. After providing expressly for the power to make rules governing the return of process, the section concludes:

"And otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

It will be presumed that the Circuit Court for the District of Colorado must have believed that it was necessary for the discharge of justice that a different rule should prevail, in regard to the requirements of answering, than that provided by the Code, and the reason is very evident. The State is divided into a large number of judicial districts, compact in territory, and a defendant served in any county of the district is generally within a short distance of the county seat of the county within which the action is commenced. Thirty days is not too long a period within which to require him to answer, but if served out of the county within which the suit is brought in the Federal Court, it is no more than right that he should be given a longer time. The Federal Court sits for the entire State of Colorado, with a territory larger in area than the entire New England States, and so far as the forty days for answering, when served outside of the county in which the suit is brought, the Circuit Court has done wisely in prescribing a longer period of time within which to

answer. And the same discretion prescribed a shorter period when the suit is brought within the county where the complaint is filed. If the power exists in the one case, it must exist in the other. The decisions of the Circuit Courts show that this has been the uniform ruling in regard to process, and we have been unable to find a case in which the right of regulating process has been denied.

Middleton Poper Co. vs. Rock River Paper Co., 19 Fed., 252.
Lowry vs. Stors, 31 Fed. Rep., 769.
Schwabacker vs. Reilly, 2 Dillon, 127.
Martin vs. Chriscuola, 10 Blatch., 211.

This Court has never passed directly upon the point involved, but the cases all seem to indicate that upon this point, as there cannot be conformity to the State statute, the whole matter is left to the sound direction of the Circuit Courts.

Respectfully submitted.

C. S. Thomas,
W. H. Bryant,
H. H. Lee,
Attorneys for Defendant in Error.

SHEPARD *v.* ADAMS.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 134. Submitted December 2, 1897. — Decided January 3, 1898.

When the court below has not acquired jurisdiction over a defendant by a valid service of process upon him, a judgment against him can be reviewed here through a writ of error directly sued out to this court.

While it was the undoubted purpose of Congress in enacting in the act of June 1, 1872, c. 255, § 5, embodied in Rev. Stat. § 914, that the "practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record in the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding," to bring about a general uniformity in Federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of

Statement of the Case.

remedies provided by state legislation, yet it was also the intention to reach that uniformity largely through the discretion of Federal courts, exercised in the form of rules, adopted from time to time, so regulating their own practice as might be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.

The summons in this case was issued under a general rule adopted to make proceedings in the District Court conform to those existing at that time under the state statutes; and if the court has not changed its rules to make its proceedings conform to subsequent statutes changing the state proceedings, it is to be presumed that its discretion was legitimately exercised both in adopting and in maintaining the rule.

THIS was an action brought in the District Court of the United States for the District of Colorado, by Frank Adams, receiver of the Commercial National Bank of Denver, against J. B. Shepard on a promissory note, dated June 7, 1893, wherein said Shepard promised to pay to the said bank, thirty days after date, the sum of twenty thousand dollars.

A writ of summons, in the form prescribed by the rule of that court, was sued out against the said defendant on the 24th day of August, 1895, whereby he was required to appear and demur or answer to the complaint filed in said action in said court within ten days, (exclusive of the day of service,) after the summons should be served on him, if such summons should be made within the county of Arapahoe, otherwise within forty days from the day of service.

On August 27, 1895, the depaty marshal made return of said writ as served that day on the defendant at Denver, county of Arapahoe.

Within ten days after the service of said summons, to wit, on the 4th day of September, 1895, the defendant, by his attorneys, specially appeared and moved the court to quash the summons for the following reasons:

"First. Said summons is not such a summons as is provided for by the statutes of Colorado. The said summons is made returnable and requires the defendant to appear and answer in this action in this court within ten days from the day of the service of said summons, instead of thirty days, as provided by the statutes of Colorado.

"Second. The copy of said summons served upon said

defendant is not certified to as a true copy by the clerk of this honorable court."

Thereafter, to wit, on the 4th day of January, 1896, the court, after hearing argument of counsel, overruled said motion, and the defendant electing to stand by said motion, rendered judgment in favor of the plaintiff and against the defendant, according to the prayer of the complaint.

A bill of exceptions was signed and a writ of error allowed to the Supreme Court of the United States.

It appears, by the bill of exceptions, that, on March 17, 1877, the general assembly of the State of Colorado passed an act entitled "An act providing a system of procedure in civil actions in the courts of justice of the State of Colorado," which act contained the following provisions: Code, 1877, c. 3.

"Civil actions in the district courts and county courts shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought and the issuing of a summons therein; provided, that after the filing of the complaint a defendant in the action may enter his appearance therein, personally or by attorney, which appearance shall be equivalent to personal service of the summons upon him."

"The time in which the summons shall require the defendant to answer the complaint shall be as follows: 1st. If the defendant is served within the county in which the action is brought, ten days. 2d. If the defendant is served out of the county, but in the district in which the action is brought, twenty days. 3d. For all other cases, forty days."

The summons in this cause was issued and made returnable under and in pursuance of a general rule of the District Court of the United States for the District of Colorado, adopted on October 10, 1877, which is in the following terms:

"Actions at law shall be commenced by filing a complaint with the clerk, upon which a summons shall be issued, directed to the defendant, requiring him to appear and demur or answer to the complaint within ten days from the day of service, if such service shall be made within the county from which the summons was issued, and within forty days from the day of service if such service shall be made elsewhere in the district.

Statement of the Case.

Except as provided in these rules and in the laws of the United States, the summons and the pleadings, and proceedings in the action shall be as prescribed in the laws of the State."

It further appears that the general assembly of the State of Colorado passed an act on April 7, 1887, repealing the above provisions in the act of 1877, and enacting as follows:

"Civil actions shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, or by the service of a summons.

"The complaint must be filed within ten days after the summons is issued, or the action may be dismissed without notice, and in such case the court may, in its discretion, if it shall be of the opinion that the action was vexatiously commenced, tax a reasonable attorney's fee as costs in favor of defendant, to be recovered of plaintiff or his attorney."

It also appears that the said general assembly, on April 19, 1889, passed an act, since then and now in force, containing the following provision:

"Section thirty-four of an act entitled 'An act to provide a code of procedure in civil actions for courts of record in the State of Colorado, and to repeal all acts inconsistent therewith,' approved April 7, 1887, is hereby amended to read as follows:

"The summons shall state the parties to the action, the State, county and court in which it is brought, and require the defendant to appear and answer the complaint within twenty days after the service of the summons, if served in the county in which the action is brought; or if served out of such county or by publication, within thirty days after the service of the summons, exclusive of the day of service, or that judgment by default will be taken against him according to the prayer of the complaint, and shall briefly state the sum of money or other relief demanded in the action; but the summons shall not be considered void or erroneous on account of an insufficient statement of the relief demanded, unless the same is manifestly misleading. If a copy of the complaint be not served with the summons, or if the service be made out of the State, ten days additional to the time specified in the

summons shall be allowed for appearance and answer, but the form of the summons shall be the same in all cases."

Mr. T. J. O'Donnell for plaintiff in error.

Mr. C. S. Thomas, *Mr. W. H. Bryant* and *Mr. H. H. Lee* for defendant in error.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

This case is brought here, under section 5 of the act of March 3, 1891, as one involving a question of the jurisdiction of the District Court of the United States for the District of Colorado; and the first contention we have to meet is that of the defendant in error, that the case is not really within the meaning of that section of said act, but presents only the case of an alleged error in the judgment of the District Court, redress for which should have been sought in the Circuit Court of Appeals. It is said that the question of whether or not the District Court acquired jurisdiction by a proper service of process is not one which involves the jurisdiction of the court, within the meaning of that term as used in the act; and the case of *Smith* v. *McKay*, 161 U. S. 355, is cited as sustaining such a view.

In the case referred to, the respective parties were duly in court and the subject-matter of the controversy was within the jurisdiction of the court; but it was claimed by the defendant that the plaintiff, instead of asserting his right by a bill in equity, should have proceeded by an action at law, which afforded an adequate remedy. The court below was of opinion that the plaintiff was not wrong in seeking his remedy in equity. Thereupon the defendant brought the case here directly, contending that the case involved the question of the jurisdiction of the Circuit Court, within the meaning of section 5 of the act of March 3, 1891. But it was held here that the court, in deciding that the plaintiff's remedy was in equity and not at law, was in the lawful exercise of its jurisdiction, and that, if

the court was wrong in so deciding, it was an error for which the defendant should have sought his remedy in the Circuit Court of Appeals.

The present case differs from *Smith* v. *McKay* in the essential feature that the contention is that the court below never acquired jurisdiction at all over the defendant by a valid service of process. In such a case there would be an entire want of jurisdiction, and a judgment rendered without jurisdiction can be reviewed on a writ of error directly sued out to this court.

The case, then, being properly before us, we must next consider whether the court below erred in assuming and exercising jurisdiction in the cause by rendering a final judgment against the defendant.

It is contended that the defendant had not been brought within the jurisdiction of the court by a proper writ of summons, and that the defendant, having duly asserted an objection, the judgment entered is void.

It is not denied that the writ in question was in conformity with the existing rule of the District Court of the United States, regulating the service of process, but it is claimed that the rule and proceedings thereunder are invalid because they did not conform to the provisions of the act of the general assembly of Colorado, providing a system of procedure in civil actions in the courts of justice of that State.

The proposition is based on the supposed meaning and effect of the act of Congress of June 1, 1872, as found in section 914 of the Revised Statutes, in the following terms: "The practice, pleadings and the forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

This section is construed by the plaintiff in error as constituting a peremptory order or direction to the District and Circuit Courts to make their rules regulating the terms and

service of their writs to strictly conform to the provisions of the state statutes regulating such matters.

Waiving any inquiry whether it is competent for a private party, duly served with process in pursuance of the directions of an existing general rule of a court of the United States, to bring into question the validity of such a rule, we think that upon a reasonable construction of section 914 and of cognate sections, presently to be mentioned, the validity of the summons and judgment in the present case can be sustained. It is obvious that a strict and literal conformity by the United States courts to the state provisions regulating procedure is practically impossible, or, at least, not without overturning and disarranging the settled practice in the Federal courts.

The state code of Colorado provides that civil actions shall be commenced by the issuing of a summons or the filing of a complaint; that the summons may be issued by the clerk of the court or by the plaintiff's attorney; it may be signed by the plaintiff's attorney; it may be served by a private person not a party to the suit. All writs and processes issuing from a Federal court must be under the seal of the court and signed by the clerk, and bear teste of the judge of the court from which they issue. Sec. 911, Revised Statutes. The processes and writs must be served by the marshal or by his regularly appointed deputies. Secs. 787 and 788, Revised Statutes.

The very section (914) relied on by the plaintiff in error, takes notice of the impossibility of an entire adoption of state modes of proceeding by providing that conformity is only required "as near as may be."

Section 915, Revised Statutes, provides that in common law cases in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are provided by the laws of the State in which such court is held; and that such Circuit or District Courts may, from time to time, by general rules, adopt such state laws as may be in force in the States where they are held in relation to attachments and other process.

Section 916, Revised Statutes, provides that the party re-

covering a judgment in any common law cause, in any District or Circuit Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided by laws of the State in which the court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such Circuit or District Court; and that such courts may, from time to time by general rules, adopt such state laws as may hereafter be in force in each State in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

Section 918, Revised Statutes, provides "that the several Circuit and District Courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

We think it is sufficiently made to appear, by these citations from the statutes, that while it was the purpose of Congress to bring about a general uniformity in Federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by state legislation, yet that it was also the intention to reach such uniformity often largely through the discretion of the Federal courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.

In *Nudd* v. *Burrows*, 91 U. S. 426, it was sought to interpret the act of June 1, 1872, (sec. 914, Revised Statutes,) as bringing the Federal judges, when charging a jury in Illinois within the practice act of that State, directing that the court, in charging the jury, shall instruct them only as to the law of the case, and give no instructions unless reduced to writing. But this court held that the statute was not intended to have

such an application, and that the course of the court, in charging juries, was not within the act.

In *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291, a similar view was taken, and it was held that, in respect to submitting interrogatories to the jury and to entertaining motions for a new trial, the Circuit Court of the United States was not, by reason of the provisions of the act of June 1, 1872, constrained to follow a state law regulating those matters; and it was said: "The conformity is required to be 'as near as may be' — not as near as may be *possible*, or as near as may be *practicable*. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statute which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals."

To the same effect is *In re Chateaugay Ore & Iron Co., Petitioner*, 128 U. S. 544, where it was held that the practice and rules of the state court do not apply to proceedings taken in a Circuit Court of the United States for the purpose of reviewing in this court a judgment of such Circuit Court; and that such rules and practice, embracing the preparation, perfection, settling and signing of a bill of exceptions, are not within the "practice, pleadings and forms and modes of proceeding" which are required by section 914 of the Revised Statutes to conform as "as near as may be" to those existing at the time in like causes in the courts of record of the State.

In *Southern Pacific Company* v. *Denton*, 146 U. S. 202, the subject and the cases were reviewed at some length, and it was held that a statute of a State, which makes an appearance in behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from jurisdiction by reason of non-residence, is not applicable to actions in a Circuit Court of the United States, held within the State, under Revised Statutes, § 914. *Luxton* v. *North River Bridge Co.*, 147 U. S. 337; *Lincoln* v. *Power*, 151 U. S. 436.

Statement of the Case.

The general rule, under which was issued the summons by which the plaintiff in error was brought into court, was adopted by the District Court of the United States for the District of Colorado on October 10, 1877, and it was in substantial conformity with the statute of Colorado then in force. Several changes in the laws of Colorado, regulating forms of procedure and the times given for defendants to appear to writs of summons, have been since enacted, but the District Court has not seen fit to alter its rules, from time to time, in subserviency to such changes. We have a right to presume that the discretion of the District Court was legitimately exercised in both adopting and maintaining the rule in question; and its judgment is accordingly

Affirmed.

MR. JUSTICE WHITE and MR. JUSTICE PECKHAM dissented.